IAC-HX-DML-V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/04174/2014
IA/04177/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 February 2015	**On 26 May 2015**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR PAUL GREENE
MRS JENNIFER MAY DAVIS STERLING
(NO ANONYMITY DIRECTION MADE)

Respondents

Representation:
For the Appellant: Mr Shilliday
For the Respondents: Ms Mallick

DECISION AND REASONS

1. Mr Greene is a citizen of the Republic of Ireland born in 1964. Mrs Sterling is a citizen of Jamaica born in 1960. Mr Green appealed against a decision of the Secretary of State made on 18 December 2013 to refuse to issue a permanent residence card because he did not satisfy the requirements of regulation 15(1) of the

Immigration (EEA) Regulations 2006. Mrs Sterling appealed against a decision of the Secretary of State to refuse to issue a permanent residence card as family member of an EEA national.

2. Although in proceedings before me the Secretary of State is the Appellant, for convenience I refer to the parties as they were before the First-tier Tribunal. Thus, Mr Greene is the 'first Appellant', (hereafter simply 'the Appellant'), Mrs Sterling the 'second Appellant' and the Secretary of State 'the Respondent'.

3. In respect of the Appellant the Respondent noted the claim that he was a qualified person for a continuous five year period but that he had ceased to be a worker due to permanent incapacity. The Respondent, however, was not satisfied that the Appellant was a worker or self-employed for two years before he had ceased activity (regulation 15(1)(c)). Also, that he was permanently incapacitated (regulation 5(3)). The Respondent also considered that he posed a threat to the requirements of public policy if allowed to remain in the UK.

4. The application in respect of the second Appellant as family member of an EEA national was refused in line under 15(1)(d) because her EEA national partner was not a worker or self-employed person who had ceased activity.

5. They appealed.

6. Following a hearing at Hatton Cross on 21 August and 23 October 2014 Judge of the First-tier Adio allowed the appeals under the Immigration (EEA) Regulations.

7. Paragraph 15 (1) states that the '*following people shall acquire the right to reside in the UK permanently-*

'…

(c) *a worker or self employed person who has ceased activity;*

(d) *the family member of a worker or self employed person who has ceased activity; '*

8. His findings are at paragraphs [30]ff. He considered the application of regulation 5 '*worker or self-employed person who has ceased activity*'.

Regulations 5(3) reads:

'A person satisfies the conditions in this paragraph if –

(a) he terminates his activity in the United Kingdom as a worker or self-employed person as a result of a permanent incapacity to work; and

(b) …

(i) he resided in the United Kingdom continuously for more than two years prior to the termination …'

9. Looking first at 5(3)(b) the judge noted that '*there is no single document which gives a definite period of employment for the first Appellant*" in the UK, however, there were documents indicating that he was registered with HMRC. Also, a letter from HMRC dated 15 April 2012 '*which notes that he did not send in his tax return for the year ending February 2011 in time and was therefore liable to a fine of £100*' [30].

10. The judge also noted that the Appellant had submitted an Inland Revenue registration card and an identification card for 'underground railways'. He further noted oral evidence and a statement from the Appellant that he recollected working at the Arndale Halifax shopping centre in 1980 for about five years and that he later worked for the underground for about six years but cannot remember a lot. He thinks he stopped working about 2007. He did not have his P60 and P45 as they had been left behind when he had to move out of where he was previously living.

11. The judge also noted oral evidence from the second Appellant that, having met him in 2007 he was working in a steel fixing company. He had worked up to 2008 when he stopped when he became ill.

12. The judge concluded '*Bearing in mind (his) alcohol and drug problems I find it credible that it is possible he has mixed up a lot of dates with regards to his employment that due to the fact that he had to move out of a property that he did not have documents with him'* [31].

13. Further, '*Taking the totality of evidence before me I am prepared to find on the balance of probability that (he) would have worked for a period of two years in the United Kingdom. I have taken into account the oral evidence albeit that there is a problem with (him) remembering exactly the period he started and stopped working but there are some documents which show that (he) has worked in the United Kingdom. (His) partner also recollected that he has worked in the United Kingdom'* [32].

14. Turning to consider whether the Appellant had terminated his activity as a result of permanent incapacity the judge appeared to accept that the Appellant's problems started with depression in 2006 following his mother's death from cancer. He noted in that regard a medical letter from SW London and St George's Mental Health NHS Trust dated 4 November 2008 which also stated he was sectioned under the Mental Health Act in Ireland and was under the care of Fulham CMHT for several months. Further, that he was reported as having slashed and stabbed his arms and also tried to hang himself as well as taking overdoses of tablets [33].

15. The judge noted that the writer of that letter stated that the Appellant's history suggests that he has '*longstanding mental health issues for which he has not been treated currently'*. The doctor was concerned about his mental state and medium to long term risk issues. Although that medical letter and another dated 30 June 2012 did not state that he is permanently incapacitated, (the latter from a GP stating '*in view of his longstanding history of psychiatric problems, drug and alcohol dependence…his incapacity is a very longstanding one and may even be permanent'*), the judge considering the medical letters in combination, along with the Appellant's evidence concluded that such '*indicate that he has not been able to work as a result of permanent incapacity to work. I have taken into account the piecemeal evidence before me and the quality of evidence indicates that*

the reason why the Appellant has not been able to work in the UK since 2007 onwards is due to being permanently incapacitated from working as a result of a long history of psychiatric problems, drug and alcohol dependence' [34].

16. The judge concluded on this matter: '*My judgment of the opinion of the medical staff in stating that the Appellant's incapacity is a longstanding one and may even be permanent should be equated as being one which is permanent as the reality of the situation is that the Appellant is unable to return to work according to the medical evidence*' [35]. He thus satisfied Regulation 5(3) and 15 (1) (c) with the result that the second Appellant succeeded under 15 (1) (d).

17. He also found that the Respondent was wrong to refuse to issue a residence card on the grounds of public policy.

18. The Respondent sought permission to appeal which was granted by a judge on 16 December 2014.

19. At the error of law hearing before me Mr Shilliday relied solely on the grounds, in effect, that on the evidence no reasonable tribunal could have accepted the Appellant's case as to 'two years employment', 'self employment, or 'permanent incapacity'. The judge had either misapplied the standard of proof or reached conclusions which were not open to him on the evidence in respect of the claim that the Appellant was employed or self-employed for two years. There was effectively no documentary evidence. The only testimony was that of the Appellant who the judge had accepted has memory problems. The second Appellant had repeated what she was told by him.

20. As for permanent incapacity the judge had concluded that as the Appellant's incapacity is longstanding such equates to permanent incapacity. Such a conclusion on the evidence was not made out. Further, he is receiving care which is aimed at his recovery and there is nothing to suggest that treatment is merely to maintain his condition. Moreover, the judge indicated that the Appellant is '*now on his way back to being rehabilitated in society with the support of his partner*' [39]. Such is contradicted by his earlier finding of the Appellant '*being permanently incapacitated from working as a result of a long history of psychiatric problems, drug and alcohol dependence*' [34]. Mr Shilliday invited me to set aside the decision and remake it by dismissing it.

21. Ms Mallick referred me to a skeleton argument. In summary the appeal by the Respondent is on the grounds of perversity. The threshold is high. The reality was that the Respondent's position amounted to disagreement with the decision. The judge's findings about the Appellant' work were supported by oral evidence from him given some support by the second Appellant. Whilst it may have been largely what he told her it was relevant and allowed her to give evidence to that effect.

22. The judge also relied on documentary evidence in support of the claim to have worked. There was no requirement for corroboration. Also, he accepted the Appellant's account as to why there was a lack of documents.

23. On the issue of permanent incapacity the judge was entitled to find on the evidence that the Appellant suffered from depression in 2006, was sectioned, self-harmed and that the mental health illness was longstanding. Also a medical opinion that the prognosis was of medium to long term risk. Further, a medical letter (30 June 2012) that he was not able to work. There was enough by way of personal history, medical evidence and oral evidence to allow the judge to conclude that the Appellant had a longstanding illness and was permanently incapacitated.

24. In considering this matter I look first at the judge's approach to whether the Appellant had shown two years work or self employment in the UK before cessation of activity. He noted the correct burden and standard of proof. He noted that there was no single document giving a definite period of employment and that documentation generally was slight: registration with HMRC, a penalty notice for failing to provide a tax return for 2011, an identification card for London Underground.

25. Despite the dearth of documentary support the judge having heard the oral evidence of the Appellant, accepted it. In summary, that the Appellant worked for a shopping centre for some years. He then worked for London Underground in station maintenance for six years until 2007. He then worked for a steel fixing company in London and that he stopped because he was ill. He was not able to produce more significant documents such as P60 and P45 because these had been left behind because he was messed up by medication and had been threatened out of his accommodation. The second Appellant gave evidence in support albeit that that evidence was mostly what the Appellant had told her, they having met in 2007 but also for a year or so from her own knowledge until he left his last job because of illness.

26. There is no requirement for corroboration (see **ST (Corroboration - Kasolo) Ethiopia [2004] UKIAT 00119**. However, '*where evidence to support an account given by a party is or should readily be available, a judge is, in my view, plainly entitled to take into account the failure to provide that evidence and any explanation for that failure*' [15].

27. In this case the judge did not simply rely on oral evidence. He also relied on some, albeit limited, documentary evidence in particular in support of his claim to have worked for London Underground. Significantly, he accepted the Appellant's account as to why there was a lack of documents namely the mess to his life caused by his mental health condition, and his medication. Also, that he had left behind a lot of documents in previous accommodation because he was '*threatened out of the property*' [10]

28. On the issue of permanent incapacity the judge concluded that the Appellant had suffered from depression from 2006 and that he had been sectioned under the Mental Health Act. Also he had had tried to kill himself. He concluded from the medical letter that gave that information (4 November 2008) that, as the doctor indicated, the Appellant had longstanding mental health problems and that there was medium to long term risk of his continuing to suffer from mental health issues.

29. He also noted a later letter (30 June 2012) from a GP which concluded '*In view of his longstanding history of psychiatric problems, drug and alcohol dependence, in (the doctor's opinion) his incapacity is a very longstanding one and may even be permanent*'. I find no merit in the ground (not raised orally) that the writers of the letters, one a doctor from the Wandsworth Community Drug Team, part of the Mental Health Trust, and a GP were not sufficiently senior to give their opinions.

30. The judge concluded that '*the combination of the letters*' along with the evidence of the Appellant '*indicate that he has not been able to work as a result of permanent incapacity to work*'. He took into account the '*piecemeal evidence*' before him and the quality of evidence which '*indicates that the reason why (he) has not been able to work in the UK onwards is due to being permanently incapacitated from working as a result of a long history of psychiatric problems, drug and alcohol dependence*'. Further, his judgment of the opinion of the medical staff in stating that the Appellant's incapacity is a '*longstanding one and may even be permanent should be equated as being one which is permanent as the reality of the situation is that the Appellant is unable to work according to the medical evidence*'.

31. The Respondent appeals on the grounds of perversity/irrationality. The threshold is high. Perversity amounting to an error of law can be established if the '*decision is one to which no reasonable decision maker, properly instructing himself on the law could have come on the evidence before him*' (**Miftari v SSHD [2005] EWCA Civ 481**).

32. Mere disagreement with a Tribunal decision is far from sufficient for an Appellate Tribunal to be satisfied that the original conclusions on the merits were perverse. As the court said in **KU (Pakistan) v SSHD [2012] EWCA Civ 391** (at [17]) '*the fact that a contrary conclusion could properly have been reached did not mean that the Immigration Judge's conclusion in paragraph 25 was perverse.*'

33. On the issue of employment the judge's findings were supported by oral evidence. He did not simply rely on oral evidence but on some documentary evidence in particular that he has worked for London Underground. He accepted the Appellant's account as to why there was a lack of documents in support.

34. I consider that the judge made findings that were open to him to reach on the evidence before him. The grounds amount to no more than disagreement with the judge. There is nothing perverse in his decision.

35. Nor did the judge make a perverse decision in finding that a longstanding illness that has resulted in the Appellant not doing employed work since 2007, amounted to permanent incapacity. The judge had evidence from doctors competent to comment, of his psychiatric condition, his history of battling with his condition and oral evidence as to why he could not work. There was enough by way of personal history, medical documentary evidence and oral evidence that allowed the judge to come to the conclusion that the Appellant had a longstanding illness and was permanently incapacitated within the meaning of regulation 5(3). The comment that he is trying to rehabilitate himself does not detract from his conclusion. It may be, particularly in this aspect of the claim, that the judge's decision was generous and a

different tribunal might have reached a different decision. However, his conclusion that all the evidence points to permanent incapacity was, again, one he was entitled to reach on the evidence before him. Again, the grounds amount to mere disagreement. The threshold of perversely is not reached.

36. On the grounds pleaded and argued by the Respondent I conclude that the judge's decision allowing the appeals is sustainable for the reasons he gave.

Notice of Decision

The decision of the First-tier Tribunal shows no material error of law and the decision allowing the appeals under the Immigration (EEA Regulations) shall stand.

No anonymity direction is made.

Signed Date

Upper Tribunal Judge Conway